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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF APPELLANT CITY OF RICHMOND

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REPLY BRIEF OF APPELLANT CITY OF RICHMOND

INTRODUCTION

Eliminating racial discrimination and its effects is a "fundamental policy" of our Nation,[1] and there is today no question that cities and states, as well as the federal government, have the power to implement this policy.[2] The exercise of this power is particularly important where racial discrimination has precluded or impaired

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[1] *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

[2] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *id.* at 324-25 (opinion of Brennan, White, Marshall and Blackmun, J.J.).

minority access to commercial opportunities created by the government itself through its award of public contracts.

Appellee and its supporting *amici* would deny cities and states the power they need to remedy that racial discrimination. On the one hand, they would require legislatures to sit as courts, obligated to make judicial-like findings of discrimination in order to justify their remedial actions. On the other hand, they would require courts to sit as legislatures, deciding whether affirmative action plans are desirable as policy and reviewing all the details of the plans to determine whether they agree with the legislature about their potential effectiveness. This reflects a fundamental misunderstanding of the appropriate roles of the legislature and the courts in our system of government and demands from state and local legislatures far more than is necessary to ensure the responsible use of affirmative action to remedy past discrimination. Under any defensible level of scrutiny, and under any fair reading of this Court's precedents, the Richmond ordinance is constitutional.

In this reply, appellant City of Richmond responds to the primary points made by appellee and its *amici*. *First*, they argue that *Fullilove v. Klutznick*, 448 U.S. 448 (1980), does not apply to this case. Their attempts to distinguish *Fullilove* are unpersuasive; the principles established there are fully applicable to this case. *Second*, they characterize the factual predicate for the Richmond ordinance as "societal discrimination." That is incorrect. The Richmond ordinance is predicated on local construction industry discrimination that, as in *Fullilove*, has been sufficiently identified to support remedial action. *Third*, they attack the evidence of construction industry discrimination. Those attacks reflect a misunderstanding of the evidentiary issues in this case. *Fourth*, they argue that the Richmond ordinance places a great burden on non-minority contractors. This argument is at odds with

Fullilove, which establishes that the burden is acceptable. *Fifth*, they contend that Richmond was required to exhaust alternatives before resorting to an affirmative action plan. This requirement is unsupported by policy or precedent, and in any event Richmond did consider alternatives. *Finally*, they criticize the thirty percent minority subcontracting requirement as unreasonable and arbitrary. This criticism is unfounded. The thirty percent figure was reasonable in light of the virtual absence of minority participation in city contracts, as well as the waiver provision in the ordinance and the limited duration of the remedy.[3]

ARGUMENT

I. THE PRINCIPLES ESTABLISHED IN *FULLILOVE v. KLUTZNICK* ARE FULLY APPLICABLE TO THIS CASE

Fullilove v. Klutznick established that there is a compelling governmental interest in creating for minority businesses opportunities in public contracting that had been impaired or foreclosed by the effects of past discrimination.[4] More particularly, *Fullilove* upheld the use of a race-conscious set-aside plan upon evidence that minority-owned businesses were receiving only a negligible portion of public construction contracts as a result of racial discrimination in the construction industry. The

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[3] Appellee also contends that the ordinance was inflexibly and unfairly applied to it. Brief of Appellee at 3. The district court decided this issue in the City's favor after hearing testimony and taking other evidence. *See* J.S. Supp. App. 209-15. It explicitly found that a minority business enterprise, Continental, was available to perform on the contract and was not taking advantage of the ordinance to charge excessive prices. J.S. Supp. App. 231, n.20. The court concluded that the City's decision to deny appellee's waiver request and re-bid the contract "was not only reasonable, but appears to have been absolutely correct." *Id.*

[4] 448 U.S. at 475-78; *id.* at 508, 515 (Powell, J., concurring).

attempts of appellee and its *amici* to limit the clear precedential value of *Fullilove* are strained and unpersuasive.

They contend that *Fullilove* concerned only the power of Congress and has no application to states or localities.[5] Although Chief Justice Burger did state that no organ of government has more comprehensive remedial powers than Congress, 448 U.S. at 483 (plurality opinion), nothing in *Fullilove* indicates that only Congress may remedy the effects of discrimination on public contracting. The focus on congressional power served two purposes, neither of which confines the principles established in *Fullilove* to federal affirmative action programs.

First, the discussion of congressional power was necessary because the Court could not uphold the federal set-aside unless it found that Congress was exercising some authority granted to it under the Constitution. 448 U.S. at 473-80 (plurality opinion). A similar constitutional analysis is unnecessary here, because state and local governments have the authority to remedy discrimination pursuant to their police powers, subject to the restraints of state law and the Fourteenth Amendment.[6] The district court found that Richmond's City Council had the authority under state law to enact its ordinance,[7] and the court of appeals did not disturb this finding.

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[5] *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Appellee at 27-28 (hereinafter "Brief for the United States").

[6] *See, e.g., Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 123, 667 P.2d 1092, 1099 (1983) (en banc); *Hutchinson Human Relations Comm'n v. Midland Credit Mgmt., Inc.*, 213 Kan. 308, 311-12, 517 P.2d 158, 162 (1973). Indeed, remedying identified discrimination in local industries is a problem more amenable to solutions at the state and local level than at the federal level. *See* Brief of the National League of Cities et al. as *Amici Curiae* in Support of Appellant at 10-14.

[7] J.S. Supp. App. 141-154.

The second reason for the discussion of congressional power in *Fullilove* was to emphasize that because Congress is a legislative body, its remedial powers are broader than those of courts and other non-legislative bodies. Chief Justice Burger stated: "Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress." 448 U.S. at 480 (plurality opinion). Of course, a national legislature necessarily has more comprehensive remedial powers than a local one, in the sense that only it may legislate on a national scale. But a local legislature is still a legislature; like Congress, its role is "to make policy rather than to apply settled principles of law." [8] Where, as here, a local legislature has acted to remedy the effects of local construction industry discrimination on its own public works program, *Fullilove* provides a highly relevant precedent for such action.

The United States also suggests that *Fullilove* is inapposite here because there are greater equal protection constraints on state and local governments than on the federal government.[9] This argument directly contradicts the well-established principle that the reach of the equal protection guarantee of the Fifth Amendment is co-

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[8] *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). *See also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974) ("The legislative function is inherently general rather than particular").

[9] *See* Brief for the United States at 27-28. The United States argues that "overriding national interests" allow Congress to enact remedial race-preferential legislation that would be impermissible as state or local enactments, citing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). *Hampton* is inapplicable here because it involved the authority to control immigration, which is "vested solely in the Federal Government, rather than the States." *Hampton*, 426 U.S. at 101 n.21. In contrast, state and local governments have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

extensive with that of the Fourteenth.[10] The Court has found no reason to hold the states to a higher constitutional standard than the federal government.[11]

In fact, the *Fullilove* plurality led by Chief Justice Burger held the federal government to a very high standard. It stressed that while reviewing an act of Congress is a "delicate duty," [12] "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U.S. at 491. It explicitly stated that the federal plan survived even the strictest standard of judicial review articulated in *Bakke*. *Id.* at 492. Justice Powell wrote separately in *Fullilove* to emphasize that the federal set-aside plan was constitutional "under the most stringent level of review." *Id.* at 496 (Powell, J., concurring).[13]

Finally, the United States attempts to limit *Fullilove* on the ground that it involved only a facial challenge to the federal plan. It argues that *Fullilove* left open the question of whether an affirmative action plan may be applied to those who are not shown to be actual victims

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[10] *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971, 2984 n.21 (1987); *United States v. Paradise*, 107 S. Ct. 1053, 1064 n.16 (1987) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[11] *Bolling v. Sharpe*, 347 U.S. at 500.

[12] 448 U.S. at 472 (plurality opinion) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

[13] While the Minority Business Utilization Plan also survives strict scrutiny, appellant submits that an intermediate level of scrutiny is more appropriate for race-conscious remedial legislation. *See* Brief of Appellant at 17-18. *See also* Brief *Amicus Curiae* of the American Civil Liberties Union et al. in Support of Appellant at 6-17.

of discrimination. Brief for the United States at 26. However, the Court since has answered this question in the affirmative. In the *Sheet Metal Workers* case, six members of the Court agreed that race-conscious relief may benefit individuals who are not the actual victims of discrimination.[14] As Justice O'Connor observed in *Wygant v. Jackson Board of Education*, the Court "is agreed that a plan [for affirmative action] need not be limited to the remedying of specific instances of identified discrimination . . ." [15]

II. RICHMOND HAS A COMPELLING INTEREST IN ITS REMEDIAL ORDINANCE

A. Local Industry Discrimination Is Not "Societal Discrimination" And Provides A Proper Predicate For Richmond's Remedial Ordinance

As Richmond argued in its opening brief to this Court, the City was not required to present evidence of its own discrimination in order to justify its remedial ordinance. *See* Brief of Appellant at 33-38. Although appellee and some of its *amici* have disagreed with this position, they have offered no principled reason that a city may remedy only its own discrimination. The United States has agreed with Richmond that "it is permissible for a state or local government, in appropriate circumstances, to seek to remedy unlawful discrimination by others." [16]

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[14] *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3034, 3054 (1986) (plurality opinion); *id.* at 3054 (Powell, J., concurring); *id.* at 3062 (White, J., dissenting).

[15] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

[16] Brief for the United States at 13. *See also* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law et al. in Support of the Appellant at 8-13 (arguing that limiting states and localities to remedying identified discrimination reflects a balance of competing interests, and that further limiting them to remedying only their own discrimination is unnecessary and upsets this balance).

The central issue is not whether the City perpetrated the discrimination supporting its remedial ordinance, but whether, as the United States argues, that discrimination is so amorphous as to constitute an inadequate basis for remedial action. In other words, assuming that "societal discrimination" alone does not constitute an adequate predicate for a government's affirmative action plan,[17] the question is whether the discrimination in Richmond's local construction industry constitutes "societal discrimination." Based on *Fullilove* and other precedents of this Court, the answer must be no.

While this Court has never actually defined the term "societal discrimination," its meaning is discernible. As the United States points out,[18] the term has been featured most prominently in the opinions authored by Justice Powell. In *Bakke*, Justice Powell characterized "societal discrimination" as "an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. at 307. Permitting it to serve as a basis for remedial action, he stated, would turn the affirmative action remedy "into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Id.* at 310. In *Wygant*, Justice Powell continued in this vein. He stated: "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive." 476 U.S. at 276 (plurality opinion) (emphasis in original).

Indeed, all discrimination that has occurred in our society could be said to be part of societal discrimination.

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[17] A plurality of this Court so stated in *Wygant*, 476 U.S. at 276, but the question has not been decided by a majority of the Court.

[18] *See* Brief for the United States at 15.

Only when it is "identified" does it become something more. *See Fullilove*, 448 U.S. at 497 (Powell, J., concurring). In other words, societal discrimination simply means discrimination that has not been identified with any degree of particularity. As *Fullilove* makes clear, an identified pattern of discrimination in a particular industry does not constitute societal discrimination.[19]

Like Congress, the Richmond City Council did not predicate its legislation on general discrimination within our society and leave it at that. It had ample evidence of actual discrimination in its local construction industry. *See infra* at 10-14. The discrimination that the City identified was not a collection of "discrete and isolated decisions,"[20] but a pattern of intentional behavior designed to ensure whites a superior position in the industry. There is nothing amorphous about the systematic exclusion of blacks from the construction trades,[21] or the

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[19] Justice Powell did not consider the discrimination at issue in *Fullilove* to be "societal." He explicitly upheld the federal plan as a remedy for "the continuing effects of past discrimination identified by Congress." 448 U.S. at 496 (footnote omitted). He also recognized that the discriminatory activities could not be expected to be "identified with the exactitude expected in judicial or administrative adjudication." *Id.* at 506. *See also* Note, *The Non-Perpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant*, 101 Harv. L. Rev. 1797, 1805-06 (1988).

[20] Brief for the United States at 17.

[21] "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979). Congress found that the exclusion of minorities from the construction trades had prevented them from gaining experience in the construction industry. *See Fullilove*, 448 U.S. at 511-12 (Powell, J., concurring). *See also* Brief of the Minority Business Enterprise Legal Defense and Education Fund et al. as *Amici Curiae* in Support of Appellant at 10-12 ("Pervasive employment discrimination in the construction trades has prevented minorities from following the traditional path from laborer to entrepreneur").

purposeful maintenance of a "business system which has traditionally excluded measurable minority participation." [22] The effects of this discrimination, the virtual absence of blacks from city contracting and from Richmond's major construction trade associations—the mainstream of the construction industry—are also quite concrete, as is the City's role in perpetuating those effects through its award of city contracts.

In short, the City was not trying to remedy discrimination in society generally, but was addressing the specific problem of discrimination in a local industry and its effects on the City's own public works program. The discrimination that it sought to remedy was no less "identified" than that supporting the federal plan in *Fullilove*. A city must be permitted to take remedial action in such circumstances.

B. Richmond Had Sufficient Evidence Of Local Construction Industry Discrimination To Support Its Remedial Ordinance

Appellee and supporting *amici* spend a substantial portion of their briefs attempting to pick apart the evidence of construction industry discrimination supporting the Richmond ordinance.[23] In so doing, they reveal their misunderstanding of the evidentiary issues in this case.

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[22] H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove*, 448 U.S. at 466 n.48 (plurality opinion) and at 505 (Powell, J., concurring)).

[23] Appellee suggests that the idea that the Richmond ordinance was a remedy for construction industry discrimination is being raised now for the first time. *See* Brief of Appellee at 10 n.3, 12. This is untrue. The district court explicitly upheld the ordinance as a remedy for the "present adverse effects of past discrimination in the construction industry." J.S. Supp. App. 163. In addition, the City Attorney stated at the City Council hearing that the City was relying on a Supreme Court decision (*Fullilove*) that had permitted remedial legislation based on industry discrimination. J.A. 15. The City's briefs in the lower courts also refer to industry discrimination. *See, e.g.*, Defendant's Brief in Support of Motion for Partial Summary Judgment at 32, 34.

The central evidentiary question is not whether there has been a factual finding of discrimination of the sort necessary to prevail on a discrimination claim, but whether the City had "sufficient evidence to justify the conclusion that there has been prior discrimination." [24] This evidentiary requirement reflects the well-settled principle that legislatures, whether they be local, state or federal, are not expected to act like courts. In reviewing the sufficiency of the evidence of discrimination in *Fullilove*, for example, this Court stressed that "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." [25]

The "sufficient evidence" requirement should be applied in light of its purpose, which is to ensure that an affirmative action plan that purports to be remedial is in fact a response to discrimination, rather than an attempt to use racial classifications to achieve racial balance for its own sake or for some other impermissible purpose. Accordingly, a government need only have evidence of discrimination sufficient to ensure that its plan is truly remedial and need not prove specific acts of discrimination. The evidence supporting Richmond's ordinance easily satisfies this test.

Appellant has never contended that any one fact conclusively proves that there has been discrimination in

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[24] *Wygant*, 476 U.S. at 277 (plurality opinion). *See also id.* ("a strong basis in evidence" is needed); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (government needs "firm basis to believe that remedial action is required").

[25] 448 U.S. at 478 (plurality opinion). *See also id.* at 502 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law"). *See also* Brief of the States of New York et al. as *Amici Curiae* in Support of Appellant at 7; Brief of the Maryland Legislative Black Caucus as *Amicus Curiae* in Support of Appellant at 21-28.

Richmond's local construction industry. Conceivably, the fact that a city half black had been awarding more than 99 percent of its construction contracts to white-owned contractors could be due to other causes.[26] Similarly, the fact that Richmond's chapter of the Associated General Contractors counted *no* blacks among its 130 members, and the fact that other major trade associations also had very few or no black members, may not by themselves necessarily reflect industry discrimination. It is also theoretically possible that the well-known and well-documented history of discrimination in the nation's construction industry[27] somehow has not infected Richmond.

When these facts are viewed as a whole, however, the conclusion that there has been racial discrimination in Richmond's local construction industry is unavoidable. The City Council did not enact the Minority Business Utilization Plan based on speculation or assumptions about past discrimination. It was familiar with the his-

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[26] This is not, however, because the statistic does not reflect the number of city contracting dollars reaching minority firms through subcontracts, as appellee suggests. *See* Brief of Appellee at 13. As the district court found, *see* J.S. Supp. App. 167-69, there is no reason to believe that minority firms were faring much better on subcontracts.

Appellee's statement that white prime contractors in fact were making significant use of minority subcontractors is misleading. Brief of Appellee at 8. Richmond's City Manager did state at the public hearing that overall minority participation in city contracts was 7 or 8 percent, but he was referring to all city contracts, not construction contracts. J.A. 16. Similarly, this Court should give no weight to appellee's reference to unidentified documents not in the record of the case that it claims show that minority firms were awarded 10.5 percent of the City's construction purchase orders (under $10,000) during an unspecified time period. Brief of Appellee at 10 n.3. Even if the represented fact were in the record, it is irrelevant since it would not change the fact that minority firms were receiving less than one percent of the more valuable city construction contracts.

[27] *See* Brief of Appellant at 23-25 & n.38.

tory of race relations in Richmond generally and with the local construction industry in particular. The City Council knew that discrimination in the local construction industry substantially had foreclosed minority access to city construction contracts. While the need for judicial review of race-conscious legislative action is clear, a legislature's view of facts should be upheld if it is so obviously reasonable and supported by the record.[28]

Appellee also fails to recognize that the critical stage for establishing an affirmative action plan's factual predicate is when the plan is challenged in court;[29] appellee erroneously treats the City Council's hearing as though it were the entire record in the case.[30] Moreover, appellee does not appreciate that it bears the burden of proof in challenging Richmond's remedial plan. Although the government must present evidence of discrimination to support its plan, it does not bear the ultimate burden of persuasion: "[I]t is incumbent upon the non-minority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose." [31]

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[28] *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981) (courts should not "substitute their evaluation of legislative facts for that of the legislature").

[29] *Wygant*, 476 U.S. at 277 (plurality opinion). *See also id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

[30] Appellee ignores the fact that the City Council's public hearing was just the final step in the process by which the Minority Business Utilization Plan became law. For example, it incorrectly suggests that prior to the hearing the City Council members had no statistics on minority participation in city construction contracts. Brief of Appellee at 8. In fact, prior to the public hearing council members were well aware of the negligible number of contracts awarded to minority firms and were involved in developing the remedial plan with the City Attorney. J.A. 26-27.

[31] *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment). *See also id.* at 277-78 (plurality

One *amici* group also would like to rewrite the facts of this case. The Washington Legal Foundation and the Lincoln Institute have questioned the previously undisputed fact that the number of minority contractors in Richmond is "quite small." J.S. App. 7a. They have attempted to introduce into the record statistics of the United States Census Bureau indicating that in 1982 there were 144 black-owned construction firms in Richmond.[32] They fail to mention, however, that the same statistical table from the Census Bureau survey indicates that only 30 of those 144 "firms" had paid employees, and that the gross annual sales and receipts of the 144 firms totaled only $3.3 million, or less than $24,000 per "firm." Even the 30 firms with paid employees had only 77 employees among them and averaged gross receipts of only $70,000 annually.[33] The Census Bureau information thus tends to confirm what the City has known all along: that there are minority-owned construction firms in Richmond, but that most are small, struggling operations that are outside the mainstream of the local construction industry and have been precluded from competing with more established firms for city contracts.[34]

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opinion); *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987).

[32] Brief of *Amici Curiae* the Washington Legal Foundation and the Lincoln Institute for Research and Education at 9-10 (hereinafter "Brief of the Washington Legal Foundation").

[33] U.S. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises: Black* at 88 (1985).

[34] The Washington Legal Foundation and the Lincoln Institute also suggest that the fact that minority businesses received only .67 percent of the value of city construction contracts is misleading because minority firms might have received a large number of small contracts, while white-owned firms received a few large contracts that would skew the statistics. *See* Brief of the Washington Legal Foundation at 15. They are incorrect. Had they reviewed the list of the $124 million in construction contracts that Richmond awarded between 1978 and early 1983, which is part of the record

III. THE RICHMOND ORDINANCE IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE

A. The Ordinance Does Not Unnecessarily Burden Third Parties

Appellee and its *amici* claim that the ordinance unduly burdens non-minority contractors. Their argument is inconsistent with this Court's precedents.[35] White contractors are not like the white teachers laid off in *Wygant*, or the white firefighters discharged in the *Stotts* case.[36] They do not have a legitimate proprietary interest in receiving any particular public contract, or for that matter, in maintaining their existing market share of

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in this case, they would have known that there were 215 contracts awarded, that 14 were for more than $1 million, and that these 14 contracts accounted for approximately $65 million of the $124 million total, or approximately half. *See* Def. Ex. D. This means that even if contracts over $1 million are not considered, minority firms still received well under two percent of the City's construction contracts.

Amici Washington Legal Foundation and Lincoln Institute also state that it is their "understanding that the current experience under the Richmond plan is that in order to satisfy the 30 percent set-aside provision, there is extensive use of minority firms located in Atlanta and Philadelphia." Brief of the Washington Legal Foundation at 22. Not only is this not in the record, it is erroneous.

[35] To support its argument that the ordinance "impose[s] an unduly harsh competitive burden on non-minority contractors," appellee states that it was denied the ability to perform the work on the public contract on which it had bid because of the City's subcontracting requirement. Brief of Appellee at 28-29. This ignores the fact that appellee simply could have re-bid on the contract. *See supra* note 3. In addition, it conflicts with this Court's recognition that "[a]s part of this Nation's dedication to eradicating racial discrimination . . . innocent persons may be called upon to bear some of the burden of [a race conscious] remedy." *Wygant*, 476 U.S. at 280-81 (plurality opinion).

[36] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

public contracts. Thus, the ordinance "unsettle[s] no legitimate firmly rooted expectation[s]." [37]

In addition, the ordinance does not single out any individual non-minority contractor. The impact of the ordinance is "limited and so widely dispersed that its use is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515 (Powell, J., concurring). In fact, the *Wygant* plurality contrasted the indirect "light burden" imposed on white contractors by the comparable minority set-aside requirement in *Fullilove* with the heavy burden of the layoffs that fell directly on white teachers in *Wygant*. 476 U.S. at 282-83.[38]

B. Richmond Selected A Reasonable Means Of Attaining Its Remedial Goal

The United States contends that before resorting to the ordinance the City was required to show that "non-race-specific remedies ha[d] been or clearly would [have] been unavailing," and that such alternatives were in fact available to the City. Brief for the United States at 21. It is wrong on both counts.[39]

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[37] *Johnson*, 107 S. Ct. at 1455.

[38] The United States' argument that the ordinance "may require the layoff of innocent workers" is strained. Brief for the United States at 23. It offers no reason to believe that the ordinance will in fact have such a direct impact on non-minorities.

[39] The United States' suggestion that the availability of alternatives is the "critical factor" in the "narrowly tailored" analysis also is unsupported. Brief for the United States at 21. If one factor has been the most telling, it is not the availability of alternatives, but the impact of race-conscious relief on third parties. Indeed, this proved to be the dispositive factor in the only two decisions of this Court during this decade striking down affirmative action plans. *See Wygant*, 476 U.S. at 278, 283-84 (plurality opinion); *id.* at 294 (White, J., concurring); *Stotts*, 467 U.S. at 574-76, 578-79. *See also Paradise*, 107 S. Ct. at 1076 (Powell, J., concurring) ("particularly important" that the race-conscious measure did not unduly burden innocent whites).

The United States' proposed requirement would strip the City of any discretion in selecting an appropriate remedy for identified discrimination. Even under strict scrutiny, this Court has not "in all situations 'required remedial plans to be limited to the least restrictive means of implementation. . . .'" *Paradise*, 107 S. Ct. at 1073 (plurality opinion) (quoting *Fullilove*, 448 U.S. at 508 (Powell, J., concurring)). Instead, the question of alternative remedies is viewed in conjunction with the other factors that comprise the narrowly tailored test. Furthermore, the availability of alternatives bears on the question of whether the means actually employed were "necessary." *See Paradise*, 107 S. Ct. at 1067 (plurality opinion). Therefore, although "less intrusive means might serve the ends, [the] choice of remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

Richmond's ordinance not only has a minimal impact on third parties, *see supra* at 15-16, but it is a reasonable means of remedying the identified problem. The problem the City faced was that minority contractors had been excluded from the mainstream of the construction industry and were not participating in public contracting. The ordinance was designed to team up minority firms as subcontractors with established white-owned firms. This served to remove some of the practical obstacles that had kept minority firms out of public contracting, such as access to financing. It also was designed to give minority businesses experience in public contracting, which would familiarize them with the contracting system and provide them with an opportunity to develop a track record.[40] This approach was particularly appropriate because "the subcontracting system offers entrepreneurs a training

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[40] *See* R. Glover, *Minority Enterprise in Construction* 73 (1977) ("a contractor can build his business through public work").

ground in which to develop the skills necessary to become a successful contractor." [41]

The City did consider alternatives. Based on its past experience, however, the City determined that these measures either had not been or would not be efficacious. Prior to enacting the ordinance, the City had passed legislation banning discrimination in its public contracting.[42] In addition, as the district court found, minority businesses had been receiving different kinds of federal, state and local assistance, but "continued to participate in miniscule proportion as prime contractors in the City's construction contracts. . . ." J.S. Supp. App. 193. The district court determined that the City was aware of "other governmental efforts at various levels to promote minority business development," but considered a minority subcontracting requirement to be the most appropriate means to address its problem. *Id.* at 194.

C. The Thirty Percent Minority Subcontracting Requirement Is Flexible And Reasonable

Appellee and its *amici* criticize the thirty percent subcontracting requirement as arbitrary and unreasonable. Their criticism is unfounded. The thirty percent figure "necessarily involve[d] a degree of approximation and imprecision." [43] However, it would not have been sensible for the City to tie the subcontracting requirement to the

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[41] U.S. Civil Rights Commission, *Selected Affirmative Action Topics in Employment and Business Set-Asides*, Vol. 1, at 90 (1985) (testimony of John W. Sroka, Executive Director, Occupational Divisions of the Associated General Contractors of America).

[42] Human Rights, Richmond, Va. Code § 17.2 (1975) (attached as Appendix No. 2 to Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law et al.). This ordinance banned both discrimination in the award of public contracts and employment discrimination by public contractors.

[43] *Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

number of minority contractors in Richmond, as the United States argues,[44] since that number was artificially low because of discrimination. J.S. Supp. App. 167. It was reasonable for the City to conclude that some greater number of minorities should and would have participated in public contracts but for industry discrimination.[45] The thirty percent figure represents a "halfway" mark between the minority population of Richmond and the existing number of minority contractors doing business with the City, and thus parallels the approach adopted by Congress and upheld by this Court in *Fullilove*. 448 U.S. at 513-14 (Powell, J., concurring).

Furthermore, the thirty percent subcontracting requirement is not rigid. The inclusion of a provision permitting the requirement to be lowered or waived indicates that the thirty percent figure "contains significant elements of flexibility . . . ." *Paradise*, 107 S. Ct. at 1076 (Powell, J., concurring). In addition, the limited duration of the subcontracting requirement enhances its reasonableness.

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[44] Brief for the United States at 22.

[45] The United States attacks the ordinance as overbroad because it includes groups such as Aleuts and Eskimos as eligible minorities. Brief for the United States at 22. This point is irrelevant as a practical matter, however, since such groups are highly unlikely actually to benefit from the plan.

CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse the decision of the court of appeals and uphold the constitutionality of Richmond's Minority Business Utilization Plan.

Respectfully submitted,

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